SHAREHOLDER RIGHTS GROUP

February 3, 2020

Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Electronic address: rule-comments@sec.gov

RE: Proposals on Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8) File Number S7-23-19) and Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice (File Number S7-22-19)

Focus: Impact of Rulemaking Proposals on Shareholder Rights: Aggregation, Representation, Expression and Participation In Corporate Affairs Under the Proposed Rules

Dear Ms. Countryman:

We are writing today to comment on the above-captioned rulemaking proposals on behalf of the Shareholder Rights Group. The Shareholder Rights Group is an association of investors formed in 2016 to strengthen and support shareowners' rights to engage with public companies on governance and long-term value creation. Our members are a group of leading proponents of shareholder proposals, as well as representatives of clients and beneficial owners on whose behalf many of our members file proposals.

We have written previously to comment on the rulemaking proposals.[1] Today, on this final day of the comment period, we are writing to express our concerns and objections to the manner in which the proposed rule changes would infringe upon shareholders' rights including rights of participation in corporate affairs, representation, association, and expression. These are among the bundle of rights associated with stock ownership. Infringement on those rights undermines interests that the Commission is charged with protecting and advancing, including investor protection, efficiency, competitiveness of small businesses, and the public interest.

The imbalanced rulemaking proposals that undermine these rights failed to make any attempt to calculate and consider the benefits of shareholder

[1] On November 22, 2019, we wrote to urge the Commission to extend the comment deadline for proposals. On January 6, 2020 we wrote to discuss the combined detrimental economic impact of the proposed resubmission thresholds and proxy advisory proposals.

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proposals, while relying on flawed cost estimates to justify stringent changes to the rules. The proposing release gave such scant attention to the lost benefits of shareholder proposals that would be excluded, that it did not comply with the Commission's internal guidance on economic analysis. [2] Many other comment letters have documented the enormity of this failure of the Commission to establish a reasonably complete baseline of economic analysis before issuing a rule proposal,[3] and therefore we will not replicate those efforts here. As the Investor Advisory Committee has stated, however, the Commission needs to conduct such a balanced analysis PRIOR to issuing a proposed rule, and therefore the current situation necessitates revision and re-noticing of the proposal.

As a result, we urge the Commission to reject the rulemaking proposals, conduct a baseline and balanced economic and policy analysis and then revise and reissue the rulemaking proposal with reasonable alternatives that are less disruptive of investors' rights and interests.

This comment[4] considers the impact of the following provisions on investor rights and interests:

1. Increasing the thresholds regarding the amount of shares or length of time held for filing of proposals, and denying smaller shareholders the opportunity to aggregate shares to meet the elevated thresholds.

2. Limiting terms of representation of shareholders:

    A. Requiring detailed documentation of preauthorization of a specific proposal by a shareholder when the proposal is filed by a representative.

    B. Requiring the representative and proponent of a proposal to be available to meet with the company on a specified time and date, and denying an individual share owner the right to communicate through a representative.

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[2] As the Investor Advisory Committee has noted, this failure necessitates that the Commission undertake the needed research, and then revise and reissue the proposal for public comment. The Commission's internal guidance on economic analysis states: "Proposing stage. The proposing release should include a substantially complete analysis of the most likely economic consequences of the rule proposal." Memorandum: Current Guidance on Economic Analysis in SEC Rulemakings, From: RSFI and OGC, To: Staff of the Rulewriting Divisions and Offices (March 16, 2012). Recommendation of the Investor Advisory Committee (IAC) Relating to SEC Guidance and Rule Proposals on Proxy Advisors and Shareholder Proposals, January 24, 2020. https://www.sec.gov/spotlight/investor-advisory-committee-2012/sec-guidance-and-rule-proposals-on-proxy-advisors-and-shareholder-proposals.pdf.

[3] *See, for instance*, comment letters of Josh Zinner, ICCR, January 27, 2020, Frederick Alexander, The Shareholder Commons, January 29, 2020, USSIF, January 31, 2020, James McRitchie, January 21, 2020, Julie Gorte, Impax Asset Management , January 20, 2020.

[4] We separately have discussed the impropriety of the proposed resubmission thresholds in our previously submitted comment of January 6, 2020.

C. Limiting representatives to filing only one proposal at a company on behalf of their various clients.

3. Establishing new requirements for review of proxy advisor recommendations, and in the course of doing so, denying equal opportunity for proponents to review and comment on a proxy advisor's final recommendations regarding a shareholder proposal.

COMMENTS AND RECOMMENDATIONS

1. FILING THRESHOLDS AND AGGREGATION

Filing Thresholds

The rulemaking proposal would require a substantial increase in the number of shares required to be held if a proponent files a proposal after holding the shares for a year, from the current $2,000 to $25,000. It would allow a $2,000 shareholder who has held shares for three years to file a proposal, and it would bar aggregation of shares to meet these thresholds.

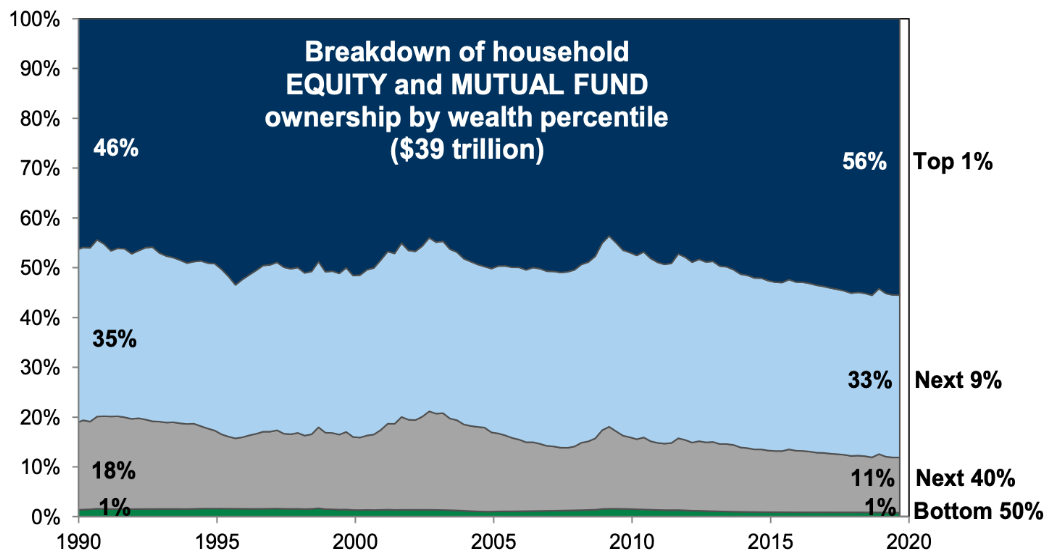
Commission Chairman Jay Clayton has stated that a purpose of the proposed rulemaking is to support the interests of so-called Main Street investors. Beginning with the new filing thresholds, the rulemaking proposal does not do so. This failure begins with lack of consideration of a baseline of an "average" retail portfolio on which to base the filing thresholds. Various commenters on the current rulemaking record have suggested figures for average or median portfolios, and discussed the impact on diversification and portfolio management of a retail investor seeking to hold shares sufficient to file a proposal with portfolio companies on a timely basis when needed.

For instance, the need to file a proposal may emerge when a company or its board takes actions of concern to the smaller investors, such as creating a crisis through ill-advised company actions in the communities or regions in which the company operates and the shareholders reside, yet the Commission's filing threshold would force those shareholders to wait three years, even on an urgent issue, denying access to the proxy to raise the issues.

This redistributive impact of the rulemaking proposal – redistributing participatory rights as a "wealth benefit" that would only be readily available to the wealthiest 1% of US households, has also been noted in comments.[5]

[5] Comment Letter of Christine Jantz, Jantz Management LLC January 21, 2020 https://www.sec.gov/comments/s7-23-19/s72319-6672544-204026.pdf:

> Examination of the highest dollar requirement shows that forcing a shareholder to maintain $25,000 in her portfolio concentrated on a single company intensely increases inequity in the proxy process. Based on wealth, the top 10% with half a million or more in savings are the only individual investors with the means to hold a minimum diversified portfolio of at least 20 equities meeting the Commission's new dollar threshold.



Source: Federal Reserve Board, Goldman Sachs Global Investment Research

A substantial portion of current investment strategies for retail investors involve asking representatives to conduct active engagement with companies in one's portfolio, especially on emerging issues, and to file proposals on the investor's behalf when necessary. This means that the retail investor with modest means and a portfolio holding of stock in the company well below $15,000 would be disabled from filing a proposal for at least three years, even in the face of urgent developments.

Moreover, the proposal would distort investing incentives in a manner that would otherwise be inconsistent with portfolio management theories, including the need for diversification and trading in response to other considerations. In addition, the underlying assumptions regarding whether an investor with $2,000 in stock held for a year has sufficient skin in the game to merit the right to file a proposal is contextual for the individual shareholder. Out of a $27,000 or

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And, as we explained in an article on this subject ("Filing Thresholds and Main Street Investors"), even for existing thresholds, given 50% or greater drops in stock prices in severe recessions, and given the requirement of holding the minimum threshold dollar amount of stock for at least a year, a 100% buffer is needed in order to ensure meeting any filing threshold. For the proposed filing threshold increase to $25,000, an individual investor would need a million dollar portfolio of 20 stocks in order to have *both* a diversified portfolio and still meet the SEC's $25,000 threshold over a one year period. Only 1% of American households would meet both of these requirements. **Thus, the SEC's elevated filing threshold effectively creates a new wealth benefit for the top one percent.** The other 99% will be forced to take an unacceptably high level of personal risk with their assets in order to bring a shareholder resolution to the proxy—creating a wealth-based shareholder class of second class citizenship. And as discussed above, because women and minorities have less wealth than white men, this requirement is inherently gender- and race-biased.

$60,000 balanced portfolio, $2,000 in stock held for a year is a very major commitment and substantial skin in the game. Because it would be inappropriate from the perspective of privacy rights to evaluate shareowner holdings against their personal assets, retaining the $2,000 threshold for holdings of one year is the most reasonable alternative for ensuring continued inclusion of retail investors.

Recommendation: Retain the $2,000/One Year Filing Threshold

The $2,000/one year holding period threshold should be retained.[6] A balanced review of the costs and benefits of the shareholder proposal process would make it clear to the Commission that this threshold remains appropriate,although increasing the one year filing threshold to $3000, based on the rate of inflation,[7] may be justified.

Aggregation Rights

In addition to increasing thresholds and holding periods that would undermine the rights and interests of retail investors in maintaining participation in the process while maintaining diversified portfolios, the proposal would also prevent those retail shareholders from aggregating their shares to reach the new higher thresholds. The rulemaking proposal justifies this based on the idea that it would ensure that every proponent has "a sufficient economic stake or investment interest in the company to justify the costs associated with a shareholder proposal."[8] Yet as noted above, the economic stake of $2,000 in shareholdings represents a very substantial commitment to the average retail investor.

Since shareholders currently have a right to aggregate with other shareholders at the $2,000 level,[9] denying this right at a much higher level is a very steep encroachment on these rights on top of the increase in the filing threshold.[10] To retail investors utilizing an investment strategy that depends on active engagement to advance the financial prospects of portfolio companies, this undermines their investing strategy.

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[6] Larger thresholds such as $25,000 proposed by the commission might be suitable to investors with shorter holding periods than a year.
[7] The rulemaking proposal asks, "Should we amend Rule 14a-8(b) as proposed?" Our answer is no, we do not believe this amendment is appropriate and urge the Commission not to promulgate it.
[8] Rulemaking proposal, page 139.
[9] The Staff has allowed cosponsors of shareholder proposals to aggregate their holdings for the purposes of meeting the $2,000 or 1% threshold. See e.g., Exchange Act Release No. 34-20091 (August 23, 1983), footnote 5 which states "Holdings of co-proponents will be aggregated in determining the includability of a proposal." *PG&E Corporation* (Feb. 18, 2003) (denying request to exclude cosponsors because company "did not assert that the aggregated holdings of the co-proponents do not satisfy the minimum share ownership requirements specified by Rule 14a-8(b).")
[10] The rulemaking proposal asks, "If we were to allow shareholders to aggregate their holdings to meet the thresholds, should there be a limit on the number of shareholders that could aggregate their shares for purposes of satisfying the proposed ownership requirements?"
We would suggest that the commission continue allowing shareholders with $2,000 in stock held for a year to aggregate to meet the first year threshold. This will minimize the damage to existing rights.

Moreover, denying aggregation rights causes the rule to make an unjustified and inappropriate distinction between individual and institutional modes of aggregation and representation of investor interests. The rulemaking proposals would have the effect of privileging aggregation and representation via institutional investments over the rights and extant legal capacities of individuals who choose to invest individually through firms or brokers, rather than through a pension or mutual fund.

Thus, failing to allow aggregation could well have an impact on competition between mechanisms and organizations offering different active investing strategies, and thus an impact on competition is implicated by this failure to allow aggregation. The proposed rules could be expected to increase costs and inflexibility for firms engaged in impact or ESG investing. This implies, as well, impact on competition between the sectors and others in the economy. The extent of the impact on both such sectors should be evaluated, and reasonable alternatives should be evaluated by the Commission that would not unnecessarily interfere with these business models.

Recommendation: Allow Aggregation of Shares for Filing Proposals

The Commission should continue to allow aggregation of shares that represent the pooled interests of stockholders at that company, regardless of whether they are institutional investors. This includes retail stockholders no matter how or under whose auspices they are organized and aggregated.

2. LIMITING TERMS OF REPRESENTATION OF SHAREHOLDERS

A. Preauthorization to file proposals

The rulemaking proposal on shareholder proposals contains new requirements of Rule 14a-8(b)(1)(iv) to document prior authorization of a shareholder proposal by the individual share owner prior to filing by an agent. This is inconsistent with the functional, working relationships that have been established under the shareholder rule and under the state law of agency. Investors have long relied on contractual arrangements, advisory and fiduciary relationships, and ESG analysis and engagement experts to advance their investing goals, delegating in many instances stock trading, voting, engagement and proposal filing authorities to their trusted advisors - all without requiring preauthorization.[11]

Under the terms of many agreements to manage a client’s portfolio, particularly strategies of active stewardship and engagement of portfolio companies, investment decisions, including the decision to file shareholder proposals when needed, are conducted under specific instructions from the clients. The need for nimble responses in drafting and filing of shareholder proposals,

[11] See also, the comments of Timothy Smith and others, January 27, 2020. https://www.sec.gov/comments/s7-23-19/s72319-walden-012720.pdf.

no less than for stock trading, necessitates that a pre-approval process would undermine the rights and interests of those investors in effective representation.

The Commission's proposed, exacting requirements for authorization letters appear to lack grounding in necessary research on the baseline of common practice in the market, by which many Main Street investors prefer to grant broad authorization and flexibility to their account managers to exercise their rights as shareowners. The proposal does not appear to be based on any analysis or consideration of the degree to which existing fiduciary relationships, regulatory safeguards and contractual frameworks provide sufficient guardrails to ensure that the filer by proxy, as an agent, is faithfully representing its clients' requests.

The few anecdotes asserting abuse of "filing by proxy" do not justify a far-reaching restrictive rule requiring preauthorization of a specific proposal, limiting the ability of investors to ask their advisors to exercise judgment on their behalf as they do in many other contexts. For instance, many investors entrust advisors or organizations as expert advisors to exercise full authority to engage on their behalf and to file proposals when necessary. It is not in the interest of those investors to create new, inflexible requirements that may prejudice proposals by eliminating the opportunity to revise the proposal, however needed, up to the issuer's filing deadline. It is also against the interest of other investors in the market and at the same firm to have issues significant to the company elevated for discussion and deliberation, since disabling the investor and their agent in this manner will inevitably lead to exclusion of additional proposals that could not be changed to comply with the exacting preauthorization requirements.

The rulemaking proposal for preauthorization builds on language in Staff Legal Bulletin 14I, November 17, 2017, which provided guidance for one means of documenting that a proposal's specific topic was authorized by the proponent. The Bulletin noted:

"In general, we would expect this documentation to:

- identify the shareholder-proponent and the person or entity selected as proxy;
- identify the company to which the proposal is directed;
- identify the annual or special meeting for which the proposal is submitted;
- identify the specific proposal to be submitted (e.g., proposal to lower the threshold for calling a special meeting from 25% to 10%); and
- be signed and dated by the shareholder."

However, the Staff Bulletin implied that documenting preauthorization as shown in the rule was *one path* for persuading the staff that the proposal was filed consistent with instructions from the proponent. The Bulletin did not state that failure to meet the checklist was an absolute basis for exclusion, but instead stated: "We believe this documentation will help alleviate concerns about proposals by proxy, and will also help companies and the staff better evaluate whether the eligibility requirements of Rule 14a-8(b) have been satisfied in connection with a proposal's submission by proxy. Where this information is not provided, there may be a basis to exclude the proposal under Rule 14a-8(b)."

Thus, a proper reading of the Staff Legal Bulletin is that it provided a *pathway* to satisfy concerns about authorization. The Staff has historically, appropriately exercised a rule of reason in interpreting the proof of ownership and authorization requirements. For instance, the Staff has made it clear that overly technical and legalistic arguments about proof of ownership will not be a basis for excluding proposals where the combination of evidence demonstrates that ownership was effectively proven.[12]

Similarly, the Staff has generally maintained flexibility regarding the type of authorization documentation required. This is assessed in context, with flexibility as to the form of assurances that in a given proposal filing, there was sufficient evidence of the agent's bona fides.[13] These

[12] Staff Legal Bulletin 14K noted: "This season, we observed that some companies applied an overly technical reading of proof of ownership letters as a means to exclude a proposal. We generally do not find such arguments persuasive."
[13] For instance, in *Baker Hughes Incorporated* (Feb. 22, 2016) the representative of the shareholder demonstrated that in every instance that involves an RIA there are sufficient contractual and contextual protections to demonstrate that the RIA representative has been fully authorized by the shareholder in the process.

In that instance, Newground Social Investment noted in the filing papers that "authorized to undertake these actions on its [the Proponent's] behalf... since it is clear that as a Registered Investment Advisor registered with the SEC, [Newground represents] clients of all types and [has] both ethical and legal obligations to do so faithfully."

Baker Hughes asserted that additional evidence of authorization is required; however, Newground declined to provide alternate evidence because neither SEC Rule nor the State Law of Agency discusses, details, or requires the presentation of additional documentation in this circumstance. Subjected to a test case, the Staff demurred to the proponent, and declined to find that authorization was inadequate.

Specifically, the proponent had stated that it is appropriate for Staff to clarify that it is not necessary under Rule 14a-8 for an investment firm to take actions beyond those provided under the Rule or Law of Agency: i.e., (1) to state that it represents a client, (2) to demonstrate a relationship with the client by providing rule-compliant, third-party documentation of proof of continuous ownership (the Letter of Verification), and (3) to convey the intent of that client to continue to hold the requisite value of shares through the time of the next shareholders meeting (the "Statement of Intent"). The proponent noted:

> The appropriateness of a Registered Investment Advisor making such assertions is no different from the appropriateness of an attorney (acting as an agent) to assert, without providing other written proof, the authority to speak on behalf of his or her client. A lawyer and a Registered Investment Advisor acting on behalf of their respective clients represent parallel instances, in both of which it is unnecessary and inappropriate to challenge the authority of the agent (absent concrete evidence that may suggest a lack of proper agency).
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> The State Law of Agency gives broad discretion to an investment firm to act on behalf of its clients. In a wide array of activities, under State Law it is not necessary for an investment firm to provide instance-by-instance documentation of its authority in order to represent a client. Nor should it be the case in filing proposals under SEC Rules, because there are in place sufficient checks-and-balances that prevent Newground (or any other Registered Investment Advisor similarly situated) from making a fraudulent assertion of authority in order to gain access to a company proxy.

may include for instance, a demonstration of a fiduciary duty to the proponent. Such a context may include legal safeguards inherent in or documented in the course of contracting with engagement experts, agents, Registered Investment Advisors, lawyers, brokers, etc.

Because the Staff Legal Bulletin was not a rulemaking, it was issued without the benefit of opportunities for notice and comment. Therefore, the present rulemaking provides the first formal opportunity for the investing community to weigh in on whether the proposed framework for documenting authorization is workable, or whether existing relationships established pursuant to state law provide adequate safeguards to address the concerns of the SEC and issuers that a proposal that is filed on behalf of an investor is consistent with instructions from that investor, i.e. consistent with the terms of the agency relationship.

While proponents have long prepared and signed authorization letters or contracts to document that they have authorized the filing of a proposal, the Staff Legal Bulletin attempted to go beyond existing practice and could be construed to mandate that the authorization to file a proposal must be for a specific company, meeting and topic only, and must describe the specific proposal that will be filed on behalf of the proponent. Where investment firms and agents have attempted to fulfill the strictest possible application of the Staff Legal Bulletin's checklist for documenting preauthorization, this has posed problems, especially the requirement to identify the specific proposal to be submitted with such specificity that the content cannot be adjusted prior to filing without obtaining further authorization from the client.

An authorization process that is consistent with current practice is for the firm or agent to follow client instructions. This does not require or necessitate preauthorization of the form and content of a proposal. For instance, the client may have authorized proposals on climate change or on ESG issues at any companies in his or her portfolio. In drafting the proposal, the advisor may conclude closer to the time of the deadline that instead of filing a proposal to " to develop a plan to align the company's greenhouse gas emissions with global climate goals" to instead request that the company "take all necessary measures to mitigate its impact on the climate." Under the

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Specifically, there is a clear *lineage of authority* that involves a shareholder (Newground's client), the independent custodian (who generates and delivers the Letter of Verification of ownership), and Newground (the Registered Investment Advisor). Under this *lineage*, a third-party custodian would not produce a Letter of Verification and deliver it to Newground without authorization from the shareholder who, in turn, would not authorize the Letter of Verification's production and delivery without knowledge of and a desire for Newground to file the proposal on the shareholder's behalf.

The simple fact is that current SEC practice has established a seamless context, or *unity of documentation* -- constituted by the Letter of Verification of ownership, Statement of Intent to hold shares, and the Shareholder Proposal. Neither of these elements stands by itself, nor could either one of these elements on its own allow a shareholder filing to go forward and to appear in a proxy. The Letter of Verification may be viewed as the linchpin of this *unity of documentation* -- both because its very existence is proof of an intact *lineage of authority*, and because without it a filer (whether the shareholder or their agent) could not move past the Deficiency Notice stage of submitting a shareholder proposal.

terms of the authorization guidance, the topic "climate" could be seen as inadequately specific, and the change to the proposal could be construed as requiring a different authorization letter. This level of specificity has proved problematic when, in exercising due diligence, a needed change is identified by the advisor close to or at the filing deadline.

This unworkable micromanagement of the relationships between proponents and their agents and advisors is formalized in the rulemaking proposal. Furthermore, the rulemaking proposal goes on to micromanage the authorization requirements even further than the Staff Legal Bulletin, to require that the authorization letter also include the shareholder's "supporting statement". This appears to go even further than the rulemaking proposal, increasing the inflexibility for an advisor to make changes to the supporting statement once an authorization letter is issued.

These impositions of inflexibility on the advisor represent an inappropriate constraint on the advisor-shareholder relationship and are not consistent with maximizing the assurance that a proposal can be revised until the filing deadline to best meet the requirements of the Commission's rules. Because of the disruptive impact of the proposal to impose this exacting preauthorization requirement, the Commission has an obligation to consider reasonable alternatives.

As noted above, the Staff has previously demonstrated a reasonable alternative — maintaining flexibility regarding the authorization documentation, and assessing the documentation in context of contractual and other legal safeguards on the agency relationship. Since there is not currently language in the rule regarding authorization to file proposals, it would be reasonable for the Commission to add a requirement that, in response to a Rule 14a-8(f) notice of deficiency associated with proof of ownership, the agent of the investor can be required to demonstrate that they were acting consistent with instructions from the share owner. This less micromanaging approach to authorization should suffice to satisfy the concerns regarding filing by proxy; the excessive additional requirements under the proposal constitute an unnecessary infringement on the agency relationships established pursuant to state law.[14]

B. Requiring an Opportunity for Engagement

The Commission notes in the rulemaking proposal that it intends to encourage engagement by placing the onus on the proponent to agree to meet with the company:

> Finally, by requiring a statement from the proponent that he or she is willing to meet with the company after submission of the shareholder proposal, the proposed amendments could encourage direct communication between the proponent and the company, which could promote more frequent resolution of the proposals outside the

[14] Requiring the commission to consider the adequacy of "the existing state law regime" and the differences between it and the federal regime in terms of efficiency and capital formation before supplanting state law with federal rules—failure to do so is "arbitrary and capricious;" Am. Equity Inv. Life Ins. Co. v. SEC, 613 F.3d 166

> voting process. Such resolutions could decrease the costs that companies and their shareholders incur to process shareholder proposals.

Others have asserted in their comment letters that Commission efforts to *encourage engagement* beyond judiciously administering the shareholder proposal rule is outside the ambit of Commission authority, and we agree.[15] However, the existing proposal on engagement is also entirely impractical, and if the Commission chooses to promote engagement, we recommend that it consider a reasonable alternative — instead of imposing the responsibility for engagement on individual proponents or their advisors and representatives, the Commission could suggest that a company's no action request include a brief statement as to whether or not they attempted to engage with the proponent prior to filing the request. This would serve the purpose of encouraging the parties to engage, without imposing and unworkable legal obligation on either party.

There are at least three substantial problems with the requirement for the proponent to identify a time to be available to meet with the company. First, it is a highly impractical suggestion given the way that scheduling works, and given the potential to drag the Staff into the complicated position of being drawn into the drama and conflicts associated with engagement, which the Staff has wisely, assiduously avoided until now.

Secondly, the proposal eschews the opportunity for the proponent to fully utilize a spokesperson. The requirement for the proponent to *personally* make themselves available for engagement with the company disrupts current working relationships between proponents and their chosen spokespeople. We believe this imposition would not stand up to First Amendment scrutiny as it implicates rights of free expression and association. In addition, the process is oddly skewed against the individual investor and in favor of the company.[16]

Many investors currently engage in the shareholder proposal process by hiring advisors and representatives who pool clients' concerns and interests with expertise and staffing for engagement and proposal filing when necessary. Under the practices that have evolved under the rule, individual proponents as well as organizations such as foundations give instructions to representatives, and expect that the representative will serve as their best means of making their wishes heard. Those representatives serve throughout the investment and engagement process - from analysis of and engagement with portfolio companies, to filing proposals, and further negotiating potential withdrawal of the proposal. At no point in the process do the representatives of foundations or other shareholders who avail themselves of this process require the share owner themselves to make an appearance, talk with the company, approve drafts of proposals, etc. Instead, *the proposal process is integral to an overall investing strategy* – sustaining

[15] Comment letter of Josh Zinner, January 27, 2020. "As an initial matter, we believe that promoting engagement is beyond the authority granted to the Commission in section 14(a) of the Exchange Act."

[16] For instance, the shareholder is typically seeking to communicate with the Board of Directors, but there is no requirement that the board or even the management make themselves available for a dialogue, only for the proponent.

investment in the market while ensuring that any necessary corporate adjustments in performance on environmental and social issues are effectively stewarded. It would be inappropriate to require the share owner to have to personally engage with their portfolio companies, and may well undermine this overall investment model. We do not believe that the Commission has a basis for doing so, and that the Commission would need far more extensive research and justification, and thorough consideration of reasonable alternatives to disruptive measures, before disrupting this business model.

Third, many share owners attempt to correspond with companies on issues of concern and received no response until a shareholder proposal is filed. Even after filing the proposal, often the first time that the proponent will hear from the company is in receipt of a no action request. Proponents believe that if there is any area where engagement should be encouraged and could reduce related costs for all concerned, it is to confirm that the company attempts to engage with the share owner *prior* to filing a no action request.

In addition to our recommendation that the Commission consider asking companies to disclose whether they sought to engage *prior to filing* a no action request, we recommend that the Commission, prior to revising and re-noticing the proposed rule develop a baseline of information through a survey of investors and companies on their engagement experiences. For instance, it would be instructive for the Commission to survey investors regarding how often they send engagement letters to companies, how much time the companies typically have to respond before the filing deadline, what portion of the companies respond to the letters, and how investors and their advisors determine at which companies to file shareholder proposals when other forms of engagement have failed.

C. The One Proposal Rule

The rulemaking proposal states in revised Rule 14a-8(c):

> “Each person may submit no more than one proposal, directly or indirectly, to a company for a particular shareholders’ meeting. A person may not rely on the securities holdings of another person for the purpose of meeting the eligibility requirements and submitting multiple proposals for a particular shareholders’ meeting.”

Further, in the background section of the rulemaking proposal it states:

> "Under the proposed rule, a shareholder-proponent may not submit one proposal in its own name and simultaneously serve as a representative to submit a different proposal on another shareholder’s behalf for consideration at the same meeting. Similarly, a representative would not be permitted to submit more than one proposal to be considered at the same meeting, even if the representative would be submitting each proposal on behalf of different shareholders."

Limiting an investment firm or other representative to only filing one proposal per year at a company represents an unjustified and unnecessary constraint on businesses, and may alter the competitive edge for firms that have specialized in active engagement and which have developed a strategy to advance long-term value at particular companies through such engagement, and through shareholder proposals when necessary. We urge the Commission not to adopt this expansion of the one proposal rule.

In addition, since the rule requires the shareholder or their representative to present the proposal in person at the meeting, it may be unclear whether it is the intent of this requirement to constrain whether a representative at the meeting can submit more than one 14a-8 proposal. We assume this is a matter of state law and not addressed by the proposed rule, and also note that the requirement to present a proposal at the company's meeting is not stated in the "eligibility" provisions of Rule 14a-8(b) but rather in Rule 14a-8(h). While this may support the argument that the proposed rule does not apply to presentation of the proposal at the meeting, if the Commission adopts its proposed amendment to the one proposal rule, it should clearly state that it does not apply to the requirement to present the proposal at the meeting.

3. PROXY ADVISORS PROPOSAL

In alignment with the concepts of equal protection and due process, the Commission has long strived to ensure procedural balance in consideration of the interests and arguments of issuers and proponents in the Rule 14a-8 shareholder proposal process. This symmetrical approach is reflected in its existing regulations and the established patterns of protection of the procedural interests of shareholders and boards and management. The entire body of rules and procedures related to Rule 14a-8, including and especially the no action process, are built on the idea that there is validity to shareholders raising issues and bringing them forth as a proposal, and that companies may have conflicting interests in excluding the proposals. The SEC sits as an arbitrator between the two by utilizing rules of fair procedure developed with the cognizance of the conflict between the opposition to proposals from management and the interests of investors in support.

This balanced approach is evident in the established no-action letter process which requires companies to share any no-action requests seeking exclusion of a proposal with the proponent and establishes ground rules for symmetrical access to information and to present arguments to the Staff for feedback and analysis. It is further seen in the requirement that the company provide the proponent with a no action request as well as its opposition statement, and that the staff consider the perspectives of both company and management, including arguments related to whether a proposal or opposition statement is misleading.

Inconsistent with such a balanced approach, the review process proposed in the proxy advisory rulemaking is unequal. The proposed rule provides an incoherent rationalization, that because proponents do not need to file solicitations they also do not need to have equal access to comment on a proxy advisors' draft recommendation. This is inconsistent with the orderly and balanced approach taken by the Commission in Rule 14a-8. In particular, the notion that receiving input from shareholder proponents would be any more or less disruptive than the comments received from issuers is without foundation. To the contrary, allowing input only from issuers will ensure that the process is skewed in precisely the way that the Commission has meticulously avoided in the crafting of Rule 14a-8.

FIRST AMENDMENT CONSIDERATIONS

As noted by Aleta G. Estreicher, *Securities Regulation and the First Amendment*:

> [W]hen a corporation "speaks" it speaks through the voice of its officers and directors, who are agents exercising derivative power on behalf of their widely dispersed shareholder-principals. The state has created a structure to facilitate this delegation of authority so that the enormous aggregation of power and wealth that is the modern corporation can function efficiently, without paralyzing diffusion of decision making. The same state that enables corporations to operate through centralized management has a substantial interest in ensuring that the manager-agents are in fact chosen by and act on behalf of their principals.[17]

The interest of government in ensuring accountability of board and management as agents of the shareholders is amplified by the many forms of imbalance in opportunities and rights of expression, tilted toward board and management. Protections for board and management speech rights abound and have been bolstered over the years: insulated boardroom decision-making, the business judgment rule, the ability to publish unlimited reports and rebuttals, opposition statements many times the length of shareholder proposals, safe harbors, the inefficiency and ineffectiveness of shareholder derivative suits at bringing accountability to the boardroom, the high cost of waging a proxy contest, and the distorted voting power due to insider and dual share ownership — to name just a few examples.

First Amendment jurisprudence endorses the idea of counter-speech. A group that is uncomfortable with the messages or power of another group is permitted to express their own message in opposition. The concept is applicable to corporate interchanges on the big issues facing a company and society. In the face of corporate free-speech rights and entrenched, self-dealing or blindered corporate boards, the "remedy is not to restrict speech but to consider and explore other regulatory mechanisms," as Justice Kennedy stated in *Citizens United v. FE*C, 558 U.S. 310 (2010).

As Karl M.F. Lockhart has written:[18]

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[17] Aleta G. Estreicher, Securities Regulation and the First Amendment, 24 Ga. L. Rev. 223, at 275 (1990) ("[I]n the modern corporate world of centralized management and widely dispersed shareholders, shareholder voting by proxy has become indispensable."). at 312.

[18] Karl M.F. Lockhart, 'Corporate Democracy'?: Freedom of Speech and the SEC, Virginia Law Review, Vol. 104, No. 8 (December 2018), pp. 1593-1635.

> "Thus, a proper response should seek to target the ways in which investor speech in the corporate setting has been limited. Those barriers should be removed. In this way, the "remedy to be applied" for increased managerial control over corporate speech will be "more speech" for shareholders, not "enforced silence."

While shareholders' right to express opposition to a management and board perspective is far from an absolute right, *the established mechanisms of shareholder democracy under Rule 14a-8 are central to those expressive rights*. The shareholder proposal process represents one of the few arenas in which shareholders wield specific influence. Because the shareholders are largely limited to filing advisory proposals, this role is limited to "influence" only and not "control". Thus, the government in regulating this shareholder right is asserting a governmental interest in preserving a balance between managers' and shareholders' speech.

Limitations on shareholder speech as imposed both by the new filing and resubmission thresholds as well as by the administrative provisions highlighted in this letter (e.g. Preventing the use of spokespeople, preventing aggregation, etc.) operate to tip the balance toward CEOs and boards and to neglect the underlying governmental interest.

The SEC has itself recognized the First Amendment implications associated with regulating investor communications.[19] Commission policy under Rule 14a-8 has thus, been grounded in a policy interest and understanding of the need to ensure that the disclosure requirements associated with Rule 14a-8 maintain an informational balance of power between corporate managers and shareholders.

We urge the Commission to consider in the context of all of its efforts to reduce the number of shareholder proposals how concentrating power in the board room will exacerbate the complacency of directors at companies where shareholder proposals have been a principal mechanism for bringing material issues to the table. Since the proposed rules, together and individually, infringe on those rights, the Commission should assess whether less intrusive alternatives could be deployed in their place.

Summary of Strict Scrutiny Basis for Review of Rule Changes

In the rulemaking proposals, the Commission has crossed a number of tripwires that would subject the infringements on shareholder rights to strict legal scrutiny under First Amendment or Administrative Procedure Act review.

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https://www.jstor.org/stable/26790718.

[19] In the 1992 Release on "Regulation of Communications among Shareholders", the Commission acknowledged that "[a] regulatory scheme that inserted the Commission staff and corporate management into every exchange and conversation among shareholders, their advisors and other parties on matters subject to a vote certainly would raise serious questions under the free speech clause of the First Amendment…." Regulation of Communications Among Shareholders, Release No. 34-31326 (Oct. 16, 1992), 57 Fed. Reg. 48276, 48279 (Oct. 22, 1992).

The proposals would interfere with thousands of private business relationships that have been created in reliance upon the SEC's rules and state law, and that have implications for freedom of expression and association. For instance, the prohibition of shareholders aggregating their shares for purposes of filing a proposal seems to implicate freedom of association. The restraints on representation – denying a shareholder the opportunity to have experts and spokespersons to speak on their behalf, has broader freedom of expression concerns. Limiting a firm to filing only one proposal at a company on behalf of its many clients may implicate commercial speech. Rule changes that infringe on shareholder rights will be subject to strict scrutiny as to whether or not the Commission has adopted the least intrusive alternative.[20]

Furthermore, the adoption of the rule changes, separately and together, would contravene numerous policy and legal principles which the Commission should address including:

1) Justifying the distinction between individual and institutional modes of aggregation and representation of investor interests. The rulemaking proposals would have the effect of privileging aggregation and representation via institutional investments over the rights and extant legal capacities of individuals who choose to invest individually through firms or brokers, rather than through a pension or mutual fund, and undermining efficiency and competition[21] by placing regulatory constraints on investment firms and advisors regarding aggregation and representation that are not imposed on larger institutional investors competing for investment clients;

2) Considering reasonable alternatives, such as making better use of existing safeguards under functioning state law requirements and processes to assess agency relationships, including shareholder rights to hire a spokesperson and agent to carry out the investor's instructions;

3) Conducting adequate research prior to issuing a proposed rulemaking, regarding the impacts of the rules on sub-sectors of financial markets, including small and medium sized impact investment and ESG brokers and advisors and regarding the costs and inefficiencies of altering or disrupting currently functional business models, advisor-client and fiduciary relationships, including the effect on the public interest and public welfare of impeding shareholders from hiring full service advisors to fulfill engagement and stewardship of portfolio companies;

4) Failing conduct of a balanced baseline of economic analysis, leading to incongruous statements of intention by the Commission – a purported intent to support Main Street investors,

[20] For example, analysis of whether the SEC's proposed regulation violates the First Amendment is subject to "strict scrutiny" and analysis as to whether it has deployed the least intrusive alternative. *See Reed v. Town of Gilbert,* 135 S. Ct. at 2231-32. "Commercial speech that is not false or deceptive and does not concern unlawful activities ... may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest." *Zauderer v. Office of Disc. Counsel*, 471 U.S. 626, 638 (1985).
[21] In addition to considering the effect on investor protection and on the public interest, the Commission must consider whether the rule promotes efficiency, competition, and capital formation. 15 USC Sec 78 c(f).

while increasing the barriers to filing proposals (filing thresholds, and cost and inconvenience), which would diminish the ability of the so-called Main Street/retail investor to participate in the proposal process, or redirect the small investor's participation toward investing decisions inconsistent with modern portfolio theories of diversification. The array of rights infringements identified in this letter would probably not have arisen, but for the failure of the Commission to conduct an effective baseline economic analysis that effectively considers the benefits as well as the costs of shareholder proposals.

CONCLUSION

The provisions of the rulemaking proposals, separately and together, are a mix of the ill-advised and unlawful, involve impractical micromanagement of relationships between clients, advisors, shareholders and companies, and in undermining shareholder rights would have significant unintended consequences on investor protection, the public interest, efficiency and competition.

We urge the Commission to reject the proposed rules.

In the event that the Commission chooses not to reject the rules, we urge that it conduct a balanced economic analysis and then revise and reissue the rulemaking proposal for public comment.

We urge the Commission to consider reasonable alternatives for achieving its goals and purposes that do not unnecessarily infringe on the rights of investors.

Respectfully Submitted,

Sanford Lewis
Director